Supreme Court, U. S.
FILED
JUL 25 1980
MICHAEL RODAK, JR., CLERK

79-1128

IN THE

SUPREME COURT

OF THE

UNITED STATES

No. 79-1128

THE STATE OF MONTANA, MONTANA STATE FISH AND GAME COMMISSION, JOSEPH H. KALBUNDE, et al.,

Petitioners,

v.

THE UNITED STATES OF AMERICA and THE CROW TRIBE OF INDIANS, MONTANA,

Respondents.

BRIEF OF AMICUS CURIAE STATE OF WASHINGTON IN SUPPORT OF PETITIONERS

SLADE GORTON,
Attorney General,
State of Washington

TIMOTHY R. MALONE,
Assistant Attorney General

Office and Post Office Address:
Temple of Justice
Olympia, Washington 98504
(206) 753-6245

(Additional states joining this brief are set forth on inside cover)

The following States, by their respective Attorneys General, joining in this brief:

ROBERT CORBIN
Attorney General
State of Arizona
State Capitol
Phoenix, Arizona 85007

ROBERT T. STEPHAN
Attorney General
State of Kansas
Kansas Judicial Center, Second Floor
Topeka, Kansas 66612

JOHN ASHCROFT
Attorney General
State of Missouri
Jefferson City, Missouri 65101

PAUL L. DOUGLAS
Attorney General
State of Nebraska
State Capitol
Lincoln, Nebraska 68509

ROBERT B. HANSEN
Attorney General
State of Utah
301 Empire Building
231 East Fourth South
Salt Lake City, Utah 84111

IN THE

SUPREME COURT

OF THE

UNITED STATES

No. 79-1128

THE STATE OF MONTANA, MONTANA STATE FISH AND GAME COMMISSION, JOSEPH H. KALBUNDE, et al.,

Petitioners,

v.

THE UNITED STATES OF AMERICA and THE CROW TRIBE OF INDIANS, MONTANA,

Respondents.

BRIEF OF AMICUS CURIAE STATE OF WASHINGTON IN SUPPORT OF PETITIONERS

SLADE GORTON,
Attorney General,
State of Washington

TIMOTHY R. MALONE,
Assistant Attorney General

Office and Post Office Address:
Temple of Justice
Olympia, Washington 98504
(206) 753-6245

(Additional states joining this brief are set forth on inside cover)

INDEX

QUESTIONS PRESENTED 1
STATEMENT OF INTEREST OF AMICUS CURIAE 2
INTRODUCTION AND SUMMARY OF ARGUMENT 2
The River Issues 3
The Regulatory Issues 5
ARGUMENT 8
I. The River Issues 8
A. The 1868 Treaty With The Crows Did Not Vest Beneficial Ownership of the Bed of the Big Horn River in the Crow Tribe 8
B. Even if Article II of the Treaty Vested Beneficial Ownership of the Bed of the Big Horn River in the Tribe, Subsequent Alienation of Riparian Lands Along the River Divested the Tribe of That Ownership over the Adjacent Portions of the Riverbed 13
II. The Regulatory Issues 14
A. Introduction 14
B. The Central Role of the Treaty 15
C. Under Oliphant v. Suquamish Tribe, the Only Available Sanction Against a Non-Member for Violation of a Tribal Law or Regulation is Expulsion 18
D. In Adopting the Indian Reorganization Act of 1934, Congress Deliberately Denied to Indian Tribes Any General Governmental Power Over Non-Indians 21
E. The Scope of the Power to Expel Non-Indians is Confined to Indian Lands 25
F. Washington v. Confederated Tribes of the Colville Indian Reservation, U.S. (June 10, 1980, No. 78-630) Demonstrates That Any Tribal Power Over Non-Indians Must Be Confined to Indian Lands and That Expulsion From Those Lands Is the Only Available Sanction 27
CONCLUSION 29

PREVIOUS PAGE WAS BLANK

TABLE OF CASES

Buster v. Wright, 135 F. 947 (CA 8, 1905), appeal dismissed, 203 U.S. 599 28

Choctaw Nation v. Oklahoma, 397 U.S. 620 10

Crow Tribe of Indians v. United States, 284 F.2d 361, 151 Ct. Cl. 281 (1960) 2

Department of Game v. Puyallup Tribe, ("Puyallup III") 433 U.S. 165 ..... 5, 7, 13, 25

Draper v. United States, 164 U.S. 204 26

Duwamish, et al., Indians v. United States, 79 Ct. Cl. 530, cert. den., 295 U.S. 755 16

Ex Parte Crow Dog, 109 U.S. 556 ..... 20, 21

Fletcher v. Peck, 6 Cranch 87 19

Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89 (CA 8 1956) 28

McClanahan v. Arizona Tax Commission, 411 U.S. 164 17

Martin v. Waddell, 16 Pet. 367 ..... 11, 12

Morris v. Hitchcock, 194 U.S. 384 ..... 6, 28

Morton v. Mancari, 417 U.S. 535 16

Oliphant v. Suquamish Tribe, 435 U.S. 191 .... 7, 18, 19, 20, 21, 26

Pollard v. Hagan, 3 How. 212 ..... 4, 12

Puyallup Tribe v. Department of Game, ("Puyallup III") 433 U.S. 165 ..... 5, 7, 13, 25

Railroad Co. v. Shurmeir, 7 Wall 272 8

Shively v. Bowlby, 152 U.S. 1 ..... 4, 9, 12

Talton v. Mayes, 163 U.S. 376 21

Tee-Hit-Ton Indians v. United States, 348 U.S. 272 16

United States v. Holt State Bank, 270 U.S. 49 10

United States v. Wheeler, 435 U.S. 313 ..... 6, 16, 17, 21

Washington v. Confederated Tribes of the Colville Indian Reservation, U.S. , (June 10, 1980, No. 78-630) 7, 27, 28

Williams v. Lee, 358 U.S. 217 ..... 16, 17

Treaties

First Treaty of Fort Laramie with the Sioux, etc., 11 Stat. 749 (1851) 2

Second Treaty of Fort Laramie with the Crows, 15 Stat. 649 (1868) ..... passim

Treaty of Medicine Creek, 10 Stat. 1132 (1854) 14

Statutes

Crow Allotment Act of 1920, 41 Stat. 751 ..... 13, 25

General Allotment Act of 1887, 24 Stat. 388 ..... 2, 13, 25, 26

Indian Reorganization Act, 48 Stat. 984 ..... 7, 21, 24

Indian Civil Rights Act, 25 U.S.C. § 1302 ..... 17, 18

Act of May 18, 1796, 1 Stat. 464, 468 8

Act of March 3, 1811, 2 Stat. 662, 666 8

Act of April 11, 1882, 22 Stat. 42 2

Act of March 3, 1891, 26 Stat. 989 2

Act of April 27, 1904, 33 Stat. 352 2

Act of August 31, 1937, 50 Stat. 884 2

18 U.S.C. § 1161 25

18 U.S.C. § 1165 25

25 U.S.C. § 323 26

25 U.S.C. § 415 26

25 U.S.C. § 467 16

33 U.S.C. § 10 ..... 3, 8, 10

42 U.S.C. § 7474 25

43 U.S.C. § 931 ..... 8, 10

Other Authorities

H.R. 7902, 73rd Cong., 2nd Sess. (1934) 22

S. 2755, 73rd Cong., 2nd Sess. (1934) 22, 23, 25

S. 3645, 73rd Cong., 2nd Sess. (1934) 24

7 Op. Att. Gen. 174 (1855) 27

17 Op. Att. Gen. 134 (1881) 27

23 Op. Att. Gen. 214 (1900) 28

55 I.D. 14 (1934) 28

Op. Sol. I.D., Ind. Aff., Vol. 1, p. 484 (December 13, 1934) 28

Crow Tribal Resolution No. 74-05 15

Hearing Before Committee on Indian Affairs, U.S. Senate on S. 2755, 73rd Cong., 2nd Sess. (1934) .. 23, 24

25 C.F.R. Part 54 16

IN THE

SUPREME COURT

OF THE

UNITED STATES

No. 79-1128

THE STATE OF MONTANA, MONTANA STATE FISH AND GAME COMMISSION, JOSEPH H. KALBUNDE, et al.,

Petitioners,

v.

THE UNITED STATES OF AMERICA and THE CROW TRIBE OF INDIANS, MONTANA,

Respondents.

BRIEF OF AMICUS CURIAE STATE OF WASHINGTON IN SUPPORT OF PETITIONERS

QUESTIONS PRESENTED

I. (a) Does an Indian treaty, which makes no specific reference to the ownership of the beds of navigable rivers running through an Indian reservation, impliedly deprive a subsequently formed state of the ownership of the riverbed to which the state would otherwise be entitled under the equal footing doctrine?

(b) If, under such a treaty, the tribe acquired ownership of the bed of a navigable river, does such tribal ownership continue even after, pursuant to federal law, the lands abutting the river have been sold to non-Indians?

II. May a tribe, in the absence of authorization by either federal statute or treaty, regulate or prohibit hunting and fishing by non-Indians on lands within a reservation after such lands have been sold to non-Indians pursuant to federal law?

STATEMENT OF INTEREST OF AMICUS CURIAE

In the state of Washington there are twenty-three Indian reservations, with most having navigable rivers flowing through them. Much of the land on these reservations has passed into non-Indian ownership, pursuant to the federal policy embodied in various allotment acts, including the General Allotment Act of 1887 (24 Stat. 388). In Washington, statewide, the non-Indian reservation population is approximately 58,000, while the Indian population is approximately 14,000. Thus, the State's interest is two-fold. Besides its interest in the beds of its navigable rivers, there is the even more important interest in the right of a major segment of its population to be free from the authority of a tribal government in which they can have no part.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 1868 the United States and the Crow Tribe of Indians entered into a treaty establishing a reservation for the Crows.[1] The heart of the treaty—and, in our view, the heart of this litigation as well— is found in Article II of the treaty:

> "The United States agrees that the following district of county, to wit: [herein follows the description of the reservation boundaries] shall be, and the same is, *set apart for the absolute and undisturbed use and occupation of the Indians* herein named * * * and the United States now solemnly agrees that *no persons*, except those herein designated and authorized so to do, and except such * * * [authorized federal personnel] *shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians* * * *" (Emphasis supplied)

As this language explicitly recognizes, the right of "absolute and undisturbed use and occupation" carries with

---

[1]Second Treaty of Fort Laramie 15 Stat. 649, Pet. Cert. App. 88. The negotiations between the Crows and the United States did not start with the 1868 Treaty, however, nor did they end there. The First Treaty of Fort Laramie was negotiated in 1851. 11 Stat. 749, Pet. Cert. App. 83. Though this Treaty recognized a large tract as Crow lands it did not create a reservation as such. *Crow Tribe of Indians v. United States*, 284 F.2d 361, 151 Ct.Cl. 281 (1960). The 1868 Treaty created the reservation out of a portion of this tract, and the reservation was subsequently reduced by various acts of Congress. 22 Stat. 42 (1882); 26 Stat. 989 (1891); 33 Stat. 352 (1904); 50 Stat. 884 (1937).

it the tribal right to exclude non-members from the reservation.

But what is the scope and effect of this tribal right to exclude non-members now, in 1980? The question is especially vexing because of the reversals and counter-reversals of federal Indian policy which have taken place since 1868. However vexing, the question is critical, and provides the common thread which runs through all the major issues to be discussed in this brief.

These issues fall into two sets, corresponding to the two principal holdings of the court below. The first holding is that the ownership of the entire bed of the Big Horn River, as it flows through the Crow reservation, is vested in the United States, as trustee for the Tribe, rather than in the State of Montana. This holding raises the first set of issues, which we caption the "river" issues.

The second holding is that the Tribe has the power to regulate, and in some cases entirely prohibit, hunting and fishing by non-Indians on non-Indian lands and in non-Indian waters. This holding raises the second set of issues, which we caption the "regulatory" issues. But throughout our discussion of all the issues, in both sets, our focus is on Art. II of the treaty.

The River Issues

Under the first set, then, are issues such as these: Does the right of "absolute and undisturbed use and occupation," and the concomitant right to exclude non-members, extend to that portion of a navigable river which flows through the reservation? That is, does Article II empower the Tribe to preclude this portion of the Big Horn from being used as a public highway.[2]

If the Tribe is so empowered, then we would conclude that, at least initially, in 1868, the bed of this portion of the Big Horn was vested in the United States, in trust for the Tribe, and not in trust for the future state of Montana. For the doctrine that the beds of navigable rivers belong to the states is based on the premise that the state is to own the

[2]We borrow the term "public highway" from 33 U.S.C. § 10, discussed at pp. 8-14, *infra*.

rivers for the benefit of the general public. *Pollard v. Hagan*, 3 How. 212 and *Shively v. Bowlby*, 152 U.S. 1. The rationale for applying that doctrine obviously disappears if the Tribe has a treaty right to exclude the non-member public from using the river for navigation.

But conversely, if the Tribe cannot exclude the non-member public and thereby preclude this portion of the river from being used as a public highway, does not any rationale for keeping ownership of the bed in the United States as trustee for the Tribe, rather than in the state of Montana, also disappear?

We urge a rejection of any double standard in the construction of Article II. The language of this Article must have the same scope and meaning when it speaks to the state of Montana as when it speaks to the federal government. More specifically, any construction of the "absolute and undisturbed use and occupancy" language which defeats Montana's interest in the riverbed of the Big Horn must logically defeat the federal government's interest in free navigability of that river's surface as well. After all, the Indian negotiators would be indeed mystified to learn that this language gave them a right to the river bottom, but no right to exclude white settlers from navigating down the river itself.

We show that Article II should not be construed to block off the Big Horn from use as a public highway and thereby defeat this federal interest. Accordingly, neither may Montana's interest in the riverbed be defeated by that same language.

Adoption of a double standard raises a serious constitutional question, in addition to the interpretive question. It would be constitutionally permissible, we agree, for a treaty to deny to a future state any ownership of the riverbed, and simultaneously to deny to the public any right to use that river as a public highway.

In such a case, a river that is navigable in fact would become non-navigable by law; it would be legally blocked off from public use. And the riparian owner—*i.e.*, the Tribe—rather than the future state would then be vested with own-

ership of the riverbed, just as is the case with rivers that are non-navigable in fact.

But the equal footing doctrine, we submit, does not allow the federal government to have it both ways. It cannot allow a river, navigable in fact, to remain open as a public highway, while denying to a state the right enjoyed by the original states; *i.e.*, ownership of the beds of all rivers which are open as public highways.

We next turn to the issue of the effect of various federal allotment acts on the question of ownership of the riverbed. This issue, of course, is reached only if our previous submission regarding the scope of Article II be incorrect.

Even if the treaty vested beneficial ownership of the riverbed in the Tribe, does that tribal ownership continue after the riparian lands have passed into non-Indian ownership, pursuant to these allotment acts? More specifically, can Article II continue to apply to the river, after it has ceased to apply to the adjacent lands? And if it cannot so continue to apply, does not the equal footing doctrine then become operative so as to vest ownership of the riverbed in the state of Montana?

This Court, we show, has answered these questions in *Puyallup Tribe v. Department of Game*, 433 U.S. 165 (*"Puyallup III"*). As *Puyallup III* makes clear, loss of the Indian ownership of the riparian lands makes Article II inapplicable both to those lands and to the river itself; and this results in the loss of ownership of the adjacent riverbed.

The Regulatory Issues

In considering the second set of issues—the "regulatory" issues—our concern is not to determine who owns what, but rather to determine what regulatory powers, if any, the Tribe has over lands which have admittedly passed from Indian to non-Indian ownership.

Though the Tribe no longer has the right to "absolute and undisturbed use and occupation" of these lands, does it still retain some type of regulatory power over the conduct of non-Indians on these lands? More specifically, what legal difference does it make that the regulatory power is being

asserted over non-Indians, rather than Indians? And what legal difference does it make that the conduct being regulated takes place on non-Indian, rather than Indian lands?

Our starting point must once again be the 1868 Treaty with the Crows. We show that any regulatory powers which the Tribe asserts—whether over Indians or non-Indians—must be traceable to that treaty. For in the absence of a statute, executive order, or—as in the case with the Crows—a treaty, by which the United States recognizes the Tribe as a legal entity, that Tribe has no legal powers whatsoever.

This is not to suggest that a federally recognized Tribe derives its governmental powers from the United States, as a city or county, for example, derives its powers from a state. Rather, as *United States v. Wheeler*, 435 U.S. 313, demonstrates, the treaty in effect guarantees to the Tribe that it may continue to exercise its inherent original sovereignty over its own members, just as it did before the coming of the European discoverers.

But what law is to govern non-Indians when they are found, for whatever reason, within the confines of the reservation? We must here make a critically important distinciton. That distinction is best understood on terms of sanctions or enforcement mechanisms.

The Tribe has the power to exclude non-Indians from all reservation lands to which Article II of the Treaty applies. Further, as part of this power, the Tribe may certainly impose conditions on the right of non-members to remain on these reservation lands.

It might condition entry on payment of tax or a license fee, as in *Morris v. Hitchcock*, 194 U.S. 384; or it might impose conditions relating to hunting, fishing or a host of other matters of tribal concern. But the only available sanction for non-compliance with these conditions would be expulsion from the reservation.

In sum: A tribe has all of the usual governmental powers, both civil and criminal over its own members, and may employ all of the usual coercive sanctions in the exercise of these powers. (When we refer to "general governmental power" or the like in this brief, we mean the power to em-

ploy these sanctions.) With respect to a non-member, however, expulsion is the sole available sanction.

To show why this is so, we examine this Court's opinion in *Oliphant v. Suquamish Tribe*, 435 U.S. 191, and demonstrate that the reasoning of this opinion is just as applicable on the civil side as it is on the criminal side of any assertion of general governmental power over non-Indians. We also examine the legislative history of the Indian Reorganization Act of 1934, 48 Stat. 984, to show that Congress has likewise deliberately rejected a policy of vesting general governmental powers civil, or criminal, over non-Indians.

This does not mean, however, that a tribe is powerless to regulate the conduct or activities of non-Indians on Indian lands; rather, it means that expulsion from those lands is the only available means of enforcement.

But does this right to expel, which is squarely based upon Article II of the Treaty, extend to lands which no longer belong to the Indians? We here take up a second critically important distinction.

These lands have been alienated to non-Indians pursuant to federal statutes. We show that the existence of any such right to expel would be completely contrary to the policy embodied in those statutes. We further show that, as made clear by this Court's decision in *Puyallup III*, Article II of the Treaty, which is the source of this power to expel, no longer applies to such lands.

Our conclusion, then, is that the Crow Tribe has neither general governmental power over non-Indians on the Crow Reservation, nor the right to expel non-Indians from non-Indian lands. Accordingly, the regulatory authority assertion by the Crows is unenforceable and invalid.

We test this conclusion, however, in light of this Court's most recent discussion of tribal power over non-Indians, in *Washington v. Confederated Tribes of the Colville Indian Reservation*, ... U.S. ..... (June 10, 1980, No. 78-630). The Court there reaffirmed the existence of tribal power to tax non-Indians. That power, however, was expressly confined to transactions or property located on *Indian* lands. And the authorities cited by the Court in support of that

power involved situations in which the only enforcement sanction invoked was expulsion of a non-Indian's person or property from those Indian lands. Thus, *Colville* supports our analysis and the conclusion to which that analysis leads.

ARGUMENT

I. THE RIVER ISSUES

A. The 1868 Treaty With the Crows Did Not Vest Beneficial Ownership of the Bed of the Big Horn River in the Crow Tribe.

The Big Horn River is a navigable river as it flows through the Crow Reservation. That fact is critical, for the reason stated in *Railroad Co. v. Shurmeir*, 7 Wall 272, 288-289:

> "[T]he court does not hesitate to decide, that Congress, in making a distinction between streams navigable and those not navigable, intended to provide that the common law rules of riparian ownership should apply to lands bordering on the latter, but that the title to lands bordering on navigable streams should stop at the stream, and that all such streams should be deemed to be, and remain public highways."

An example of how explicit Congress made this distinction between "streams navigable and those not navigable" is found in the same statute as this Court relied upon in *Shurmeir*, i.e., § 9 of the Act of May 18, 1796 (1 Stat. 468), formerly Rev. Stat. § 2476, and now 43 USC § 931:

> "All navigable rivers, within the territory occupied by the public lands, shall remain and be deemed public highways; and, in all cases where the opposite banks of any streams not navigable belong to different persons, the stream and the bed thereof shall become common to both."

Another example is found in § 12 of the Act of March 3, 1811 (2 Stat. 666), now codified as 33 USC § 10:

> "All the navigable rivers and waters in the former territories of Orleans and Louisiana shall be and forever remain public highways."[3]

[3]By its terms, the Act of May 18, 1796 applied only to the Northwest Territory. The Act of March 3, 1811, however, encompassed all territory within the Louisiana Purchase. And that territory includes the Big Horn River.

The status of navigable rivers as public highways has a direct bearing upon the question of state ownership, under the equal footing doctrine, of the riverbed underneath those public highways. *Shively v. Bowlby*, 152 US 1, 49, 50, explains the reason:

> "The Congress of the United States, in disposing of the public lands, has constantly acted upon the theory that those lands, whether in the interior, or on the coast, above high water mark, may be taken up by actual occupants, in order to encourage the settlement of the country; but that the navigable waters and the soils under them, whether within or above the ebb and flow of the tide, shall be and remain public highways; and, being chiefly valuable for the public purposes of commerce, navigation and fishery, and for the improvements necessary to secure and promote those purposes, shall not be granted away during the period of territorial government; but, unless in case of some international duty or public exigency, shall be held by the United States in trust for the future States, and shall vest in the several States, when organized and admitted into the Union, with all the powers and prerogatives appertaining to the older States in regard to such waters and soils within their respective jurisdictions; * * *"

If the Big Horn River, then, is not a public highway as it flows through the Crow Reservation, that is the end of the matter. The rationale for applying the equal footing doctrine would, in our view, disappear.

Let us examine that possibility. Taken in isolation, the language of Article II certainly allows the Tribe to exclude the general public from its reservation. And the geographical description of that reservation not only fails to exclude explicitly the Big Horn River, but expressly includes a portion of another navigable river, the Yellowstone.[4] Nor do we see any constitutional impediment to Congress conferring on the Tribe the power to block off the Big Horn from use as a public highway.

But certainly the proposition that Congress has actually

---

[4]Through subsequent reductions by statute, the Yellowstone no longer forms a reservation boundary. See note 1, supra, p. 2. But this, of course, does not resolve the interpretive problem: if part of the Yellowstone, why not the Big Horn?

conferred this power must be rejected. Statutes such as 33 USC § 10 and 43 USC § 931 have not been repealed or amended with respect to the Big Horn River or any other navigable river that flows through an Indian Reservation anywhere in the Nation.

Indeed, even in the one case in which this Court has held that an Indian Tribe owns the bed of a navigable river, the public right of navigation was found to be still intact. *Choctaw Nation v. Oklahoma*, 397 US 620, 635. In finding that right, the Court relied upon the doctrine of an implied federal navigational easement, arising under the Commerce Clause, rather than upon a specific statute such as 33 USC § 10. The Court's reluctance, exemplified in *Choctaw*, to give a Tribe control over public navigation on an otherwise navigable river should be even greater when, as here, Congress has explicitly declared that a river such as the Big Horn shall be forever open as a public highway. 33 USC § 10.

The language of Article II, then, cannot be applied literally to the Big Horn, as the Tribe and the United States would apparently apply it. But can that language, perhaps, be applied selectively, so as to defeat the State's interest in the bed of the river, while preserving the federal government's interest in unimpeded public navigation? No such double standard should be attributed to either the negotiators of the treaty or to the Senate which ratified that treaty.[5] The language of Article II should be given a consistent meaning, both when it speaks to the State and when it speaks to the Federal Government.

> "* * * [D]isposals by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain." *United States v. Holt State Bank*, 270 US 49, 55.

Any intention to vest in the Crow Tribe the right of "ab-

[5]The Indian negotiators, we agree, can hardly have been expected to be familiar with the equal footing doctrine. Neither were they familiar with another constitutional doctrine, that of a federal navigational easement arising under the commerce clause. Yet that hardly prevents application of the latter constitutional doctrine, as shown in *Choctaw*. Similarly, it should not prevent application of the former doctrine here.

solute and undisturbed use and occupation" of a riverbed, while simultaneously depriving the Tribe of the same right over the river's surface, is hardly "very plain" from the language of Article II. However generous one's standards for determining "plainness" might be, those standards should require some consistency in the application of Article II's language.

The task, then, is to find a meaning for Article II of the 1868 Treaty which accommodates both the federal government's interest in the surface of the Big Horn River, and Montana's interest in the riverbed. And, no less importantly, that accommodation must also give meaning and effect to the language of Article II establishing the midchannel of a navigable stream, the Yellowstone, as the reservation boundary. (See note 4, *supra*, p. 9.)

Martin v. Waddell, 16 Pet. 367, provides the key to this accommodation. At issue in *Martin* were conflicting claims to land under tidewater in New Jersey. One claim derived from royal charters granted in 1664 and 1674 to the Duke of York; the other derived from a grant by the State of New Jersey, pursuant to an 1824 statute. The charters conveyed the territory involved,

> "* * * together with all the lands, islands, soils, rivers * * * and all the estate, right, title, interest, benefit and advantage, claim, and demand of the King, in the said land and premises." 16 Pet. at 408.

The charters also conveyed full powers of government to the Duke.

Despite the very precise and very plain language of the charters—a conveyancer would be hard to put to make it plainer—this Court held that the King had conveyed to the Duke no private property rights to the lands under tidewater. While private property rights were certainly conveyed with respect to other lands, only governmental powers were conveyed with respect to the lands under navigable waters, and the private property rights in such lands passed to the State of New Jersey.

We do not dispute that Article II vests certain rights over the Big Horn River in the Crow Tribe. So far as the

Tribe's governmental power over its own members is concerned, for example, it matters not whether that member is on the river or on dry land. All that matters is that he be within the exterior boundaries of the reservation.

However, just as with the charters involved in *Martin v. Waddell*, property rights under Article II of the Treaty do not extend to the land under navigable waters; those property rights are reserved for the future state of Montana, just as they were reserved for the future state of New Jersey.

The accommodation which we suggest avoids a serious constitutional problem which would arise under the use of any double standard. That problem arises if the federal government attempts to have it both ways, by maintaining the status of a navigable river as a public highway, open to use by all, while conveying away the interests of the future state in the bed of that same river.

Although *Shively v. Bowlby* rejected the statement in *Pollard v. Hagan*, 3 How. 212, that Congress had no power at all to convey away a future State's interest in the bed of a navigable river, *Shively* also made it clear that such a power is not unlimited. The determining factor is the purpose of the conveyance.

> "We cannot doubt, therefore, that Congress has the power to make grants of lands below high water mark of navigable waters in any Territory of the United States, whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several States, or to carry out other public purposes appropriate to the objects for which the United States hold the Territory." 152 US at 48.

Nor can one doubt that providing a reservation as a homeland for the Indians is one of those other appropriate public purposes. But when a navigable river is kept open as a public highway, while the riverbed is conveyed away, that conveyance is not rationally related to the purpose of providing that reservation homeland. To the extent that the Indians cannot keep the public off the river, to that ex-

tent it is not "reserved" for them at all. And to that same extent, it is not "appropriate" to the object of establishing the reservation.

B. Even if Article II of the Treaty Vested Beneficial Ownership of the Bed of the Big Horn River in the Tribe, Subsequent Alienation of Riparian Lands Along the River Divested the Tribe of That Ownership over the Adjacent Portions of the Riverbed.

If our prior submission be incorrect, and if Article II of tthe 1868 Treaty vested beneficial ownership of the bed of the Big Horn in the Tribe, what is the effect of a subsequent alienation to non-Indians of adjacent riparian lands? Approximately 30% of the reservation lands have been sold to non-Indians—including lands abutting the Big Horn.[6]

In *Puyallup Tribe v. Washington Game Department*, 433 US 165 ("Puyallup III"), a similar question was before this Court. Specifically, the question was whether the State had jurisdiction to regulate, in any manner, on-reservation steelhead fishing by Tribal members.

As stated by the Court:

> "The Tribe vigorously argues that the majority of its members' netting of steelhead takes place inside its reservation, and that, while our prior adjudications settled respondent's right to regulate off-reservation fishing in the interest of conservation, neither respondent nor the state court has jurisdiction over on-reservation fishing. The Tribe relies on both the Treaty of Medicine Creek, 10 Stat. 1132 (1854), and federal pre-emption of on-reservation Indian affairs, see Mescalero Apache Tribe v. Jones, 411 US 145, 147-148, 433 US 173, 174."

The Court disposed of the Tribe's argument as follows:

> "Article II of the Treaty of Medicine Creek provided that the Puyallup Reservation was to be 'set apart, and so far as necessary, surveyed and marked out for their exclusive use' and that no 'white man [was to] be permitted to reside upon the same without permission of the tribe and the superintendent or agent.' It is argued that these words amount to a reservation of a right to

[6]Such sales were made pursuant to the General Allotment Act of 1887, 24 Stat. 388, or the Crow Allotment Act of 1920, 41 Stat. 751.

fish free of state intereference. *Such an interpretation clashes with the subsequent history of the reservation and the facts of this case.* Pursuant to two Acts of Congress, 27 Stat 633, and c 1816, 33 Stat 565, the Puyallups alienated, in fee simple absolute, all but 22 acres of their 18,000-acre reservation. None of the 22 acres abuts on the Puyallup River. *Neither the Tribe nor its members continue to hold Puyallup River fishing grounds for their 'exclusive use'.*" 433 U.S. 174 (Emphasis supplied)

In footnote 12, the Court had more to say about the river:

> "Counsel for petitioner [Puyallup Tribe] intimated at oral argument that petitioner might contend in the future that it retained trust status title to the bed of the Puyallup River, Tr. of Oral Arg 10. This contention is at odds with the otherwise uncontradicted findings below." [i.e., the findings that all but 22 acres had been alienated]

Article II of the Treaty of Medicine Creek, the counterpart of Article II of the 1868 Treaty, no longer applies to the Puyallup River—if it ever did in the first place.[7] And this is because Article II is no longer applicable to any of the riparian lands.

Once riparian lands—or any reservation lands for that matter—are alienated to non-Indians, Article II no longer applies to those lands. The right of "absolute and undisturbed use and occupation" has obviously been terminated with respect to those lands. And just as obviously, when terminated with respect to riparian lands, the application of that Article to the adjacent riverbed has been terminated as well.

II THE REGULATORY ISSUES

A. Introduction.

The action of the Crow Tribe which prompted this phase of the litigation was very simple: By ordinance, the Tribe prohibited any hunting and fishing, anywhere within the exterior boundaries of the reservation, by anyone other

[7]We do not know to what extent, if any, the Puyallup River was navigable in 1854, when the Treaty of Medicine Creek was negotiated.

than a tribal member. (Tribal Resolution No. 74-05, Pet. Cert. App. 119) What remained, however, of that tribal action after review by the Court of Appeals is less simple.

First, the prohibition was held valid with respect to non-member hunting and fishing on Indian lands, tribal or allotted. (Pet. Cert. App. 10-12) That holding is not here questioned.

Secondly, the prohibition was also held valid with respect to non-member hunting and fishing on non-Indian lands, but with one exception. The prohibition was held invalid with respect to non-members who hunt or fish, *but only when doing so on tracts on which they reside.* (Pet. Cert. App. 15)

Thirdly, even non-member residents hunting and fishing on the land on which they reside are subject to tribal regulation, though they are free of the complete tribal prohibition. (Pet. Cert. App. 16-23)[8] Such regulation might include fees, bag limits and season limits. (Pet. Cert. App. 20, 21)

What is the source of this tribal power, upheld by the Court of Appeals in the second and third holdings? Unfortunately, the Court's opinion (Pet. Cert. App. 2-26) does not really address this fundamental question.[9]

In the remainder of this brief, however, we focus entirely in this question. In so doing, we anticipate that the Tribe and the United States will attempt to uphold the second and third holdings on a theory of inherent tribal sovereignty; accordingly, we discuss that theory in some detail, and show why it will simply not serve.

B. The Central Role of the Treaty.

There exist in the United States Indian tribes which have not been recognized as such by the federal government through either a treaty, a statute or executive order. See e.g.,

---

[8]The Court also upheld Montana's concurrent power to regulate hunting and fishing by non-members, anywhere within the reservation, thus establishing a dual system of regulation. (Pet. Cert. App. 21)

[9]The opinion does, however, focus on the important question of the sanctions available to the Tribe for enforcing its regulation of hunting and fishing against non-members. We focus on this question as well, because it is so closely connected with the question of the source of the tribal power to impose the regulation in the first place.

Tee-Hit-Ton Indians v. United States, 348 U.S. 272 and *Duwamish et al Indians v. United States*, 79 Ct. Cls. 530, cert. den. 295 U.S. 755.

So long as such tribes remain in that status, their members are legally indistinguishable from any other citizen. Though racially different, they are not legally different. Cf., *Morton v. Mancari*, 417 U.S. 535. They are subject to state laws as fully as anyone else, and the tribe has no legal authority over them at all.[10]

This is not to say, however, that through a treaty the United States delegates its power to an Indian tribe, or confers power on that tribe in the way a state delegates or confers power upon a municipal corporation. As *United States v. Wheeler*, 435 U.S. 313 makes clear, a treaty *preserves* the Tribe's own pre-existing power; it does not confer a new power. But without a treaty, or other form of federal recognition, that power is not preserved.[11]

As stated in *Wheeler*:

> "[W]e have said that [i]mplicit in these treaty terms * * * was the understanding that the internal affairs of the Indians *remained* exclusively within the jurisdiction of whatever tribal government existed." *Williams v. Lee*, 358 US 217, 221-222." (Emphasis supplied)

Before the European discoverers came, "whatever tribal government existed" quite obviously, was the *only* government that existed. No one else governed the Indians. The treaty terms in effect guaranteed that this *status quo ante* was to continue, albeit within a limited geographical area termed a "reservation."

The specific treaty terms referred to in *Williams v. Lee* are the counterpart of Article II of the 1868 Treaty with the

---

[10]An unrecognized tribe is not forever locked into this status. See 25 CFR Part 54. "Procedures For Establishing That An American Indian Group Exists As An Indian Tribe." And a new reservation can be created as well under 25 U.S.C. § 467.

[11]Thus, it is misleading to say that Indian tribes retain all their inherent sovereign powers except to the extent they have been taken away by statute or treaty. The statement is correct *only* if there is a treaty or other form of federal recognition in the first place. In the absence of such recognition, the tribe retains no powers at all. To use the terminology of 25 CFR Part 54, such a tribe is only an Indian "group" and not a tribe. See note 10, *supra*.

Crows, as the immediately preceding sentence in *Williams v. Lee* makes clear:

> "* * * In return for their promises to keep peace, this treaty [with the Navajos] 'set apart' for 'their permanent home' a portion of what had been their native country, and provided that no one, except United States Government personnel, was to enter the reserved area. * * *" 358 U.S. at 221.

In *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 174, this exact same treaty language was found to be the basis for the immunity of a reservation Navajo from Arizona's tax laws. Thus in *Williams, Wheeler*, and *McClanahan*, this Court went directly back to the terms of the treaty to find either the basis of a tribal power or the basis of an immunity from an assertion of state power. The Court should do so once again in this case, to see if the power claimed really exists.

As *Wheeler* shows, the tribal governmental power over its own members which is preserved by the treaty is true governmental power; that is, it includes all of the sanctions available to other governments, such as the federal government and the states, in enforcing its laws. Thus, a tribe can subject its members to its courts, incarcerate or fine them, and seize and forfeit their property. Further, it matters not whether the laws, the court proceedings, and the enforcement sanctions be viewed as "civil" or "criminal." The Crow Tribe, of course, has this full range of sanctions available to enforce its laws over its own members, by reason of Article II of the Treaty.[12]

But what powers does a tribe have, under Article II, over non-members? We now reach a critical question. The tribe certainly has the power to expel those non-members from lands within the scope of Article II. The language of Article II is unmistakably clear on that point. But can the Tribe employ, with respect to non-members, all the other sanctions that it can employ with respect to its members? Or is it limited to the sanction of expulsion? We take up this question next.

---

[12]The Indian Civil Rights Act, 25 U.S.C. § 1302, however, has limited the severity of some sanctions.

C. Under Oliphant v. Suquamish Tribe, the Only Available Sanction Against a Non-member for Violation of a Tribal Law or Regulation is Expulsion.

Before examining the principles established by the Court's decision in *Oliphant v. Suquamish Tribe*, 435 U.S. 191, we should note what *Oliphant* did *not* decide. It did not decide that the Suquamish Tribe could not prohibit Mr. Oliphant and Mr. Belgarde, the alleged offenders, from ever again coming onto Indian lands within the Port Madison Reservation, and forcibly eject them should they do so.[13] *Oliphant*, in short, was not an expulsion case. Rather, *Oliphant* was a case in which the tribe claimed the power to impose on a non-member the full range of criminal sanctions, for violation of its laws, that it could admittedly impose on its members.

Does the reasoning by which this result was reached apply on the civil, as well as the criminal, side of a tribal assertion of general governmental power against a non-member? We here show that it does.

The structure of the opinion should here be noted. The first part examines the commonly shared presumption of Congress, the Executive Branch, and the lower federal courts that tribal courts do not have the power to try non-Indians. 435 U.S. 196-206. That presumption, however, is "not conclusive on the issue before us," but is entitled to "considerable weight". 435 US at 206. Neither is the second part, which reviews the relevant treaty provisions, conclusive either. 435 US at 208. The conclusive part is the third, which begins:

> "But an examination of our earlier precedents satisfies us that, *even ignoring treaty provisions and congressional policy*, Indians do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress." (Emphasis supplied) 435 at US 208.

The third part *is* conclusive, independently of the first two. Significantly, none of the precedents examined in this

---

[13]Of course, the Indian Civil Rights Act, 25 U.S.C. § 1302, might well require that basic due process, such as an opportunity for a hearing, be afforded before any such expulsion is effective.

third part directly involved the question of tribal jurisdiction over non-Indians, either civil or criminal. They did involve, however, the status of Indian tribes.

That status is one of subordination to and dependency upon the United States; it affects not only the relationship of the Indian Tribes with the United States Government as such, but the relationship of the Tribes with the non-Indian United States citizen as well.

> "* * * Upon incorporation into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty. "[T]heir rights to complete sovereignty, as independent nations, [are] necessarily diminished." *Johnson v. M'Intosh*, 8 Wheat 543, 574, 5 L.Ed. 681 (1823)." *Oliphant* 435 U.S. at 209

And this diminishment of tribal sovereignty resulted in the loss of the tribal power to govern anyone but the Indians themselves.

> "In the first case to reach this Court dealing with the status of Indian tribes, Mr. Justice Johnson in a separate concurrence summarized the nature of the limitations inherently flowing from the overriding sovereignty of the United States as follows:
>
> > [T]he restrictions upon the right of soil in the Indians amount * * * to an exclusion of all competitors (to the United States) from their markets; and the limitation upon their sovereignty amounts to the right of *governing every person within their limits except themselves.*
>
> *Fletcher v. Peck*, 6 Cranch 87, 147." (Emphasis in original.) *Oliphant*, 435 U.S. at 209.

Obviously, what Mr. Justice Johnson was talking about in *Fletcher v. Peck* was the power of *governing*, whether the forms of governing be characterized as civil or criminal.

The opinion continues:

> "[F]rom the formation of the Union and the adoption of the Bill of Rights, the United States has manifested an equally great solicitude that its citizens be protected by the United States from unwarranted intrusions on

> their personal liberty. The power of the United States to try and criminally punish is an important manifestation of the power to restrict personal liberty. By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress. * * *"

Oliphant, 435 U.S. at 209, 210.

Simply because an assertion of governmental power is "civil" rather than "criminal" does not mean that the hazards to a United States citizen, and the risk to his personal liberties, are any less.

To illustrate: Perhaps the most pervasive and fundamental assertion of governmental power, on the civil side, is the taxing power. The federal government, states, and local governments collect these taxes through voluntary compliance in most cases, but through compulsory enforcement mechanisms when necessary. Those enforcement mechanisms or sanctions include subjection of the taxpayer to the government's courts, forcible seizure of the taxpayer's property, and punishment of the taxpayer for non-compliance. That punishment might be through criminal proceedings; but it might be through civil fines as well; and civil proceedings might involve incarceration, for civil contempt.

It makes little difference to the taxpayer that he has lost his property or liberty through "civil" rather than "criminal" proceedings.

Nor did the holding in *Oliphant* rest upon such a distinction, as the discussion of *Ex Parte Crow Dog*, 109 U.S. 556, clearly shows. The United States was there attempting to extend federal criminal law:

> "* * * by argument and inference only, * * * over aliens and strangers; over the members of a community separated by race [and] tradition, * * * from the authority and power which seeks to impose upon them the restraints of an external and unknown code * * *; which judges them by a standard made by others and not for them. * * * It tries them, not by their peers, nor by the customs of their people, nor the law of their land, but by * * * a different race, according to the law of a social state of which they

> have an imperfect conception. * * *" 109 U.S. at 571. Quoted at 435 U.S. at 210, 211.

After this quotation, the Court in *Oliphant* continued:

> "These considerations, applied here to the non-Indian rather than Indian offender, speak equally strongly against the validity of respondents' contention that Indian tribes, although fully subordinated to the sovereignty of the United States, retain the power to try non-Indians according to their own customs."

Oliphant, 435 U.S. 210, 211.

The rationale of *Crow Dog*, as applied in *Oliphant*, logically applies to *all* tribal law. Whether that law be criminal or civil, it is equally "external and unknown" to non-Indians.

Historically, the Indian tribes have argued that they have the status of separate nations, with their own inherent governmental power over their own members. As shown by such cases as *Talton v. Mayes*, 163 U.S. 376, *United States v. Wheeler* and *Crow Dog* itself, that argument has uniformly met with success. But, under *Oliphant* it is *precisely because of this separateness* that this power of Indian tribes must be confined to tribal members, and not be extended to non-Indians.

Two last points: as already suggested, *Oliphant* in no way affects a Tribe's treaty right to exclude or expel non-Indians. It does, however, prohibit an assertion of general governmental power, be that assertion categorized as "criminal" or "civil", in which the other usual sanctions or enforcement mechanisms are sought to be utilized by the Tribe.

Secondly, *Oliphant* in no way affects the power of Congress to delegate to Indian Tribes governmental power over non-Indians. But Congress, in fact, has refused to do so, except in very narrow circumstances, as we shall next see.

D. In Adopting the Indian Reorganization Act of 1934, Congress Deliberately Denied to Indian Tribes Any General Governmental Power Over Non-Indians.

The Indian Reorganization Act, as originally introduced in Congress, was very different from the bill that eventually passed. (Act of June 18, 1934, 48 Stat. 984.) Those differ-

ences are of great significance here. The original version was introduced in the House as H.R. 7902, 73rd Cong., 2nd Sess. (1934) and in the Senate as S. 2755, 73rd Cong., 2nd Sess. (1934).

The heart of the bill was Title I, "Indian Self-Government." Section 2 of Title I read, in pertinent part, as follows:

> "In accordance with the foregoing purposes, the Secretary of the Interior is hereby authorized *to issue* to the Indians residing upon any Indian reservation or reservations or subdivision thereof *a charter granting to the said community group any and all such powers of government * * * as may seem fitting in the light of the experience, capacities, and desires of the Indians concerned * * **" (Emphasis supplied)

Section 4 spelled out in more detail the powers which were to be included in the charter. The first is found in subsection (a):

> "(a) To organize and act as a *Federal municipal corporation*, to establish a form of government, to adopt and thereafter to amend a constitution, and to promulgate, and enforce ordinances and regulations for the effectuation of the functions hereafter specified, *and any other functions customarily exercised by local governments.*" (Emphasis supplied)

Subsection (d) granted another important power:

> "(d) To establish courts *for the enforcement and administration of ordinances of the community,* which courts shall have *exclusive jurisdiction over all offenses of, and controversies between, members of the chartered community, under the ordinances of such community, and jurisdiction exclusive or non-exclusive over all other cases arising under the ordinances of the community*, and shall have power to render and enforce judgments, criminal and civil, legal and equitable, and to punish violations of local ordinances by fine not exceeding $500, or in the alternative, by imprisonment for a period of not exceeding six months: * * *." (Emphasis supplied)

Title IV of the bill also dealt with courts, establishing a Court of Indian Affairs. Section 3 of this Title spelled out the broad jurisdiction of that court, which included jurisdiction "of all cases, civil or criminal, arising under the laws

and ordinances of a chartered Indian community, wherein a real party in interest is not a member of such community." (Subsection 4)

Clearly, a chartered Indian community was to have broad legislative jurisdiction over non-members—as broad as those of any municipal corporation or other unit of local government. And the tribal courts and the Court of Indian Affairs would have jurisdiction over non-members as well.

Title I and Title IV did not survive. And a major reason was that the chairman of the Senate Committee on Indian Affairs, Senator Wheeler from Montana, was adamantly opposed.

In the hearing on S. 2755, the following exchange took place concerning Title I:

> "The Chairman. Well, you might possibly, Mr. Commissioner, get, for instance, some tribe of Indians in Montana who would want to try this, and they might get a sufficient number of signers to a petition to have a charter issued.
>
> "Commissioner Collier [of the Bureau of Indian Affairs]. Yes.
>
> "The Chairman. But if they did do it, in my judgment, it would bring about all kinds of conflicts between your Indians and the white people, and, in addition to that, it would set back the Indians, in my judgment, considerably by doing it, and I am afraid that it would lead to conflicts in the Northwest between the Indians and the whites.
>
> "I mean, supposing the Indian Bureau went out there, for instance, if you had this provision in there; your Indian Bureau could go out there and take those Indians possibly and propagandize them and get sufficient numbers of them to sign it and issue a charter, and then attempt to set up this government within a government out there, which would be, in my judgment, a serious mistake on the part of the Indians to do it." Hearing Before the Committee on Indian Affairs, United States Senate on S. 2755, 73rd Congress, 2nd Sess. (1934) p. 68 (hereinafter "1934 Hearings").

Senator Wheeler liked the proposed court system in Article IV no better. Under discussion was an amendment,

proposed by the BIA, involving the criminal jurisdiction of the court:

> "Commissioner Collier. Mr. Chairman, this amendment would leave with the proposed new court of Indian affairs all prosecutions for crimes insofar as they are prosecutions under the laws affecting Indian country.
>
> The Chairman. Yes; but it is perfectly ridiculous to set up this separate court." 1934 Hearings, p. 205.

The discussion then turned to the jurisdiction of the court, in the case of a non-Indian trying to collect a debt from an Indian. And Senator Wheeler expressed his views about the proposed court once again:

> "The Chairman. If you ever get this through Congress I will be surprised, because it is perfectly ridiculous in my judgment.
>
> "Senator O'Mahoney. Senator, I don't think you agree with this provision.
>
> "The Chairman. Well, I certainly do not agree with it, and I do not think the Indians if they understood it in the Northwest would want it, because of the fact that it would just simply hamper them and retard them rather than do them any good.
>
> "Commissioner Collier. Mr. Chairman, we have explained that we did not regard this section as an integral part of the bill, as indispensable at all.
>
> "The Chairman. Yes; I am glad of that." 1934 Hearings, p. 208.

What happened next is best explained in Senator Wheeler's own words:

> "The Chairman. * * * I got together with the Commissioner of Indian Affairs and went over the important points that I thought were in controversy, and yesterday they sent up this bill, which eliminates, it seems to me, practically all of the matters that are in controversy, * * *" 1934 Hearings, p. 237.

The bill which the BIA sent up was the bill which ultimately passed. (Compare S. 3645, reproduced at 1934 Hearings, p. 234, and Act of June 18, 1934, 24 Stat. 984). Thus the Congress, in 1934, denied to the Indians the broad, general governmental powers over Indians and non-Indians which the BIA had hoped to attain for the Indians. And that fact

is sufficient reason for this Court to deny the claim to any such powers now.[14]

E. The Scope of the Power to Expel Non-Indians, Under Article II of the 1868 Treaty, is Confined to Indian Lands.

Approximately 30% of the lands within the Crow Reservation has been sold to non-Indians, pursuant to the General Allotment Act of 1887, 24 Stat. 388, or the Crow Allotment Act of 1920, 41 Stat. 751. Does the tribal right to expel apply to these lands?

Puyallup III, 433 U.S. 165, conclusively shows that it does not, for reasons we have already discussed: Article II simply does not apply to these lands anymore. See pp. 13-14 *supra*. Any interpretation of Article II which would allow such a right to expel "* * * clashes with the * * * history of the reservation and the facts of this case." 433 U.S. at 174.[15]

Let us examine the history of the allotment policy more closely as it affected the Crow, the Puyallup and many other reservations.

Pursuant to a series of acts, the most important of which is the General Allotment Act of 1887, 24 Stat. 388, the reservations were broken up into allotments for individual tribal members, which were then frequently sold to non-Indians.

---

[14]In sharp contrast with the broad provisions of S. 2755 are such statutes as 18 USC 1165, relating to unauthorized hunting or fishing on Indian lands; 18 USC 1161, relating to sale of liquor on Indian reservations; and 42 USC 7474, relating to determination of air quality standards for reservation lands. In each of these statutes, Congress has empowered Tribes to determine what conduct is or is not lawful on reservation lands, including, in the case of the last two statutes, non-Indian lands. And those determinations affect the conduct of both Indians. and non-Indians.

But these statutes are narrowly structured: enforcement is left only to the federal government, and the subject matter is in each case very specific. Far from reflecting a congressional assumption of general criminal or civil tribal governmental power reservation-wide, over Indians and non-Indians alike, they reflect exactly the opposite assumption.

[15]The Court below correctly realized that the sale of lands to non-Indians pursuant to these allotment acts somehow restricted the power of the Tribe to impose and enforce its regulation against non-Indians on Indian lands. See, Pet. Cert. App. 15. Hence, its complicated holdings in partly upholding and partly invalidating that regulation. The Court's error, however, stemmed from its failure to see that these acts completely eliminated that power, by making Article II of the Treaty completely inapplicable to those lands.

"Surplus" lands, remaining after the allotments had been made, were sold as well.

This change in land policy was but part of a larger change. The new federal policy was nothing less than the complete integration of Indians into non-Indian society. This policy change was described by the Court in *Oliphant*:

> Today, many reservations, including the Port Madison Reservation, have extensive non-Indian populations. The percentage of non-Indian residents grew as a direct and intended result of congressional policies in the late 19th and early 20th centuries promoting the assimilation of the Indians into the non-Indian culture.

Oliphant, 435 U.S. at 202, n. 13.[16]

As a central part of this policy of assimilation, Indians were to become subject to non-Indian law.[17] As stated in § 6 of the General Allotment Act:

> "Each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they may reside."

A non-Indian settling on an Indian reservation, pursuant to this new federal policy, was thus told by the Congress that his Indian neighbor would become subject to state law, and not that he would become subject to the law of his Indian neighbor.

Most certainly, then, Congress did not contemplate that Indians would have the power to control the conduct of non-Indians on non-Indian lands, through either expulsion or any other sanction.[18]

---

[16]For an extended treatment of allotment policy, see D. Otis, History of the Allotment Policy, in Readjustment of Indian Affairs, Hearings on HR 7902 Before the House Committee on Indian Affairs, 73rd Cong., 2nd Sess., 428-40 (1934).

[17]As stated in *Draper v. United States*, 164 U.S. 240, 246, a case involving the Crow Reservation, § 6 would bring it about that " * * * the Indians themselves would have passed under the authority and control of the state."

[18]Other statutes besides the allotment acts may restrict the tribal right to expel non-Indians. Thus, a non-Indian may be on Indian land, under an easement or lease agreement approved by the Secretary of Interior, pursuant to 25 U.S.C. §§ 323 or 415. So long as the terms of the easement or lease agreement are complied with by the non-Indian in possession, the congressional policy embodied in those statutes would certainly preclude any attempt to expel him.

F. Washington v. Confederated Tribes of Colville Indian Reservation, U.S. (June 10, 1980, No. 78-630) Demonstrates That Any Tribal Power Over Non-Indians Must Be Confined to Indian Lands and That Expulsion From Those Lands Is the Only Available Sanction.

In *Colville*, this Court held that Indian tribes have the power to impose a cigarette tax on non-tribal purchasers. Slip Op. 15-17. Is that holding consistent with our submission? The Court's discussion shows clearly that it is.

> "The power to tax transactions occurring *on trust lands* and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status." (Emphasis supplied; Slip Op. 15)

And again:

> "*Authority to tax the activities or property of non-Indians taking place or situated on Indian lands,* in cases where the tribe has a significant interest in the subject matter, was very probably one of the tribal powers under "existing law" confirmed by § 16 of the Indian Reorganization Act of 1934. 48 Stat. 987, 25 U.S.C. § 476. (Emphasis supplied; Slip Op. 16)

The Court did not discuss the question of sanctions, and for good reason. If the non-Indian purchasers did not want to pay the tax, the smoke shops would not sell them cut-rate cigarettes. The sanction was simple, but effective.

The question of sanctions was involved, however, in the authorities cited by the Court in *Colville*. Thus, in 17 Op. Att. Gen. 134 (1881), "Intruders on Lands of the Choctaws and Chickasaws," the question was whether non-Indians who were on lands of these Indians without complying with their permit laws could be forcibly removed therefrom by the Department of Interior. The answer, of course, was that they could.

In 7 Op. Atty. Gen. 174 (1855), one of the questions was whether an Indian court had civil jurisdiction over a white man who had *voluntarily made himself a member of the Chickasaw Nation, and was exercising all the rights of a Chickasaw*. Again, the answer was yes.

In 23 Op. Atty. Gen. 214 (1900), "Trespassers on Indian Lands," the question again was whether a non-member could be forcibly removed by the United States for failure to pay a tribal permit or license fee on the non-member's business. Again, the answer was yes.

And in 55 I.D. 14, 46 (1934), the portion of the decision quoted by the Court refers to taxing power "* * * over non-members, so far as such non-members may accept privileges of trade, residence, etc., to which taxes may be attached as conditions." (Slip Op. 16) And those privileges, obviously, are those of conducting a trade or residing on Indian lands, from which they may be removed for not paying the taxes which have been "attached as conditions" to those privileges.

The three decisions cited in *Colville*, *i.e.*, *Buster v. Wright*, 135 F. 947 (CA8 1905), appeal dismissed. 203 U.S. 599 (1906); *Iron Crow v. Oglala Sioux Tribe*, 231 F. 2d 89 (CA 8 1956); and *Morris v. Hitchcock*, 194 U.S. 384, were all removal cases.

One last point regarding the Executive Branch's understanding of the scope of tribal power over non-Indians: even as late as 1934, that understanding was identical with our basic submission here. In an opinion of the Solicitor of the Department of Interior, December 13, 1934, interpreting the newly enacted Indian Reorganization Act, one question presented was the right of a tribe to condemn the property of a tribal member. The opinion stated:

> "It is proper to add that since the tribal power of condemnation is based, in the first instance, upon tribal jurisdiction over the members of the tribe, it ceases to exist where an Indian abandons his tribal membership; and as was said in the opinion of this Department on 'Powers of Indian Tribes,' * * * 'any member of any Indian tribe is at full liberty to terminate his tribal relationship whenever he so chooses.' * * *
>
> *"Threatened oppression in the form of condemnation, taxation, or other incidents of social control may be avoided by the termination of the landowner's tribal status. But if he remains to share in the benefits of tribal life he must bear its burdens.*

> "The restricted land of the Indian who has severed his tribal affiliation is not subject to tribal condemnation proceedings under tribal law." Op. Sol. I.D., Ind. Aff. Vol. 1, 484, at 490. (Emphasis supplied)

As this opinion explicitly recognizes, a tribal claim of general governmental power, even on the civil side, is valid only with respect to tribal members. With respect to non-members, our system of government simply has no room for "threatened oppression" in the form of "incidents of [tribal] social control" over those non-members. They do not share in the benefits; nor do they bear the burdens.

CONCLUSION

For the reasons discussed herein, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

SLADE GORTON,
Attorney General,

TIMOTHY R. MALONE,
Assistant Attorney General
State of Washington

Temple of Justice
Olympia, WA 98504
(206) 753-2552